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No. 80-1594

In the Supreme Court of the United States

OCTOBER TERM, 1981

UNITED STATES OF AMERICA, PETITIONER

v.

ERIKA, INC.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

REPLY BRIEF FOR THE UNITED STATES

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

REPLY BRIEF FOR THE UNITED STATES

Respondent contends that the amount of money it was paid by Prudential Insurance Company in reimbursement for numerous individual medical claims assigned to it by Medicare Part B beneficiaries was insufficient. Invoking the jurisdiction of the Court of Claims under the Tucker Act, 28 U.S.C. (& Supp. III) 1491, respondent brought suit for a money judgment against the United States for the amount of the alleged underpayment.

Respondent concedes (Resp. Br. 22-28, 31, 37) that nothing in the text of Part B of the Medicare statute confers a right to sue the United States for money damages in these circumstances and that there is no indication in the legislative history of a congressional intent to permit such suits. Indeed, respondent acknowledges (Resp. Br. 25-26) that the legislative history manifest a congressional intent to bar judicial review of benefit amount determinations under Part B. Respondent nevertheless argues that the Court of

Claims had jurisdiction of this case under the Tucker Act because (i) a right to judicial review of agency action must be presumed to exist ~~have~~ here absent "clear and convincing" evidence of congressional intent to the contrary, and (ii) the evidence of congressional intent to bar judicial review under Part B is not clear and convincing. Both arguments are incorrect, especially in the context of this case, in which jurisdiction is said to rest on the Tucker Act.

1.a. To reiterate the governing principles, "[i]t is elementary that '[t]he United States, as sovereign, is immune from suit save as it consents to be sued' " (*United States* v. *Mitchell*, 445 U.S. 535, 538 (1980), quoting *United States* v. *Sherwood*, 312 U.S. 584, 586 (1941)). For this reason, "the Court of Claims' jurisdiction to grant relief depends wholly upon the extent to which the United States has waived its sovereign immunity to suit" (*United States* v. *King*, 395 U.S. 1, 4 (1969)), and "such a waiver cannot be implied but must be unequivocally expressed" (*ibid.*, quoted with approval in *United States* v. *Mitchell, supra*, 445 U.S. at 538, and *United States* v. *Testan*, 424 U.S. 392, 399 (1976)). The Tucker Act itself does not contain the requisite waiver of sovereign immunity; that Act is only a jurisdictional statute. *United States* v. *Mitchell, supra*, 445 U.S. at 538. Therefore, respondent has a cause of action (and the Court of Claims had jurisdiction) in this case only if the Medicare Act itself contains an "unequivocally expressed" grant of a " 'substantive right enforceable against the United States for money damages' " (*ibid.*, quoting *United States* v. *Testan, supra*, 424 U.S. at 398).

b. In arguing that it had a right to bring the instant suit against the United States absent clear and convincing evidence to the contrary, respondent does not rely on decisions of this Court involving suits for money damages under the Tucker Act. Rather, it relies on cases brought in federal

district court seeking ordinary judicial review of agency action.

In the Administrative Procedure Act, Congress has explicitly waived the sovereign immunity of the United States and given consent to suits seeking judicial review of agency action (5 U.S.C. 702), except where judicial review is precluded by statute or the agency action concerned is committed to agency discretion (5 U.S.C. 701(a)). In these circumstances, Congress has in effect reversed the presumption against a right to sue the United States. See 1 *Moore's Federal Practice* para. 0.65 [2.-2], at 700.100 (2d ed. 1981). Accordingly, in such cases, "judicial review of a final agency action by an aggrieved person will not be cut off unless there is persuasive reason to believe that such was the purpose of Congress." *Abbott Laboratories* v. *Gardner*, 387 U.S. 136, 140 (1967); see also *Johnson* v. *Robison*, 415 U.S. 361, 373-374 (1974). These cases, upon which respondent relies (Resp. Br. 22-23), have no relevance here. Suits seeking *money damages* are expressly excepted from the general waiver of sovereign immunity in 5 U.S.C. 702, and such suits therefore continue to be governed by the established rule that there is no right to money damages that is judicially enforceable against the United States unless Congress has affirmatively conferred that right in the particular statute under which the claimant sues. See, *e.g.*, H.R. Rep. No. 94-1656, 94th Cong., 2d Sess. 3, 4-5, 11 (1976).

c. Respondent also relies (Resp. Br. 13) upon the statement in *United States* v. *Testan* that the existence of a right of action against the United States for money damages depends on whether the particular federal statute cited " 'can fairly be interpreted as mandating compensation by the Federal Government for the damage sustained.' " (424 U.S. at 400, quoting *Eastport Steamship Corp.* v. *United States*, 372 F. 2d 1002, 1009 (Ct. Cl. 1967)). Respondent seeks to bring the instant case within this language by

asserting that "medicare legislation, fairly read, mandates appropriate payment to providers" (Resp. Br. 14),[1] apparently because the Medicare program establishes a system for the *administrative* reimbursement of medical expenses incurred by Part B beneficiaries (see Resp. Br. 19-22). From this, respondent argues that the appropriate inquiry in this case is whether "Congress has carved out * * * an exception to that general grant of jurisdiction and waiver of sovereign immunity" (Resp. Br. 22; see also *id.* at 14, 21-22, 26-28; Br. in Opp. 6-7). Once again, respondent has it backwards. Neither the Tucker Act nor any other statute passed by Congress contains a general waiver of the sovereign immunity of the United States to suits for money damages, from which it would have been necessary for Congress to except Medicare claims. Rather, it is necessary to inquire in each case whether the specific statute upon which the claimant relies—here, the Medicare Act—contains an affirmative waiver of the United States' sovereign immunity to such suits.

Alternatively, respondent appears to argue that a specific waiver of sovereign immunity to suit is inherent in the Medicare Act's provision for the payment of monetary benefits under Part B and that this waiver must be given

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[1] Here and at several other places in its brief (Resp. Br. 3, 15-17, 19, 20, 21), respondent appears to suggest that it has rights as a "provider of services" that are distinct from those of the individual Part B beneficiaries from whom it has accepted assignments of reimbursement claims. This is incorrect. Respondent is not a "provider of services" for purposes of the Act. That term is defined as a hospital, skilled nursing facility, home health agency, or fund. 42 U.S.C. 1395x(u). Such "providers" are reimbursed directly for their services covered by Part A and Part B, and they have distinct statutory rights of review in some circumstances. See, *e.g.*, 42 U.S.C. 1395ff(c), 1395*oo* and 1395pp(d). Respondent, however, like physicians and other furnishers of Part B services, possesses only the procedural rights of the beneficiaries from whom it has accepted assignments. 42 C.F.R. 405.801(a); *Kechijian* v. *Califano*, 621 F. 2d 1, 4 n.4 (1st Cir. 1980); *Szekely* v. *Florida Medical Association*, 517 F. 2d 345 (5th Cir. 1975), cert. denied, 425 U.S. 960 (1976).

effect unless Congress, in enacting Part B, has carved out an exception to the waiver. See Resp. Br. 10-11, 19-21, 23. This argument, however, reduces to the suggestion that the appropriate inquiry is whether Congress, in the same part of the same statute, has engaged in the rather absurd exercise of simultaneously giving and taking away the right to sue the United States. This obviously is not the test. There is but a single ultimate question that determines the jurisdictional issue in this case: whether Part B of the Medicare Act contains the requisite "unequivocally expressed" waiver of sovereign immunity.

In any event, the premise of respondent's argument that a waiver of sovereign immunity is inherent in Part B of the Medicare Act is erroneous. The issue presented concerns the United States' immunity from *suit*, not an "immunity," as such, to the disbursement of money. Accordingly, contrary to respondent's apparent belief, the mere fact that Congress has provided for the distribution of monetary benefits administratively through private insurance carriers does not mean that Congress has thereby consented to be sued every time a beneficiary or his assignee alleges that the carrier has erred in calculating the amount of money to be paid administratively. See, *e.g.*, *Johnson* v. *Robison*, *supra*. Resolution of the sovereign immunity issue requires an analysis of the Part B program in its entirety, including the relatively small amount of money involved in the typical Part B claim, the vast number of Part B beneficiaries (more than 27 million) and individual claims they file (more than 150 million annually), and the provision for administration of the Part B program by private insurance carriers without review by the Secretary. These factors weigh heavily against concluding that Congress intended to subject the United States to the expense and burden of suits on individual Part B benefit claims. Weighing even more heavily against this conclusion, however, are the text and legislative history of Part B, to which we now turn.

2.a. Respondent concedes (Resp. Br. 23-25) that Congress granted the beneficiary a right to judicial review under Part A with respect to both the individual's eligibility to participate in the Part A program generally and the amount (if any) of benefits payable for particular services, but granted a right to judicial review under Part B only with respect to the individual's right to participate in the program. 42 U.S.C. 1395ff(b). As we explained in our opening brief (U.S. Br. 23-24), this strongly indicates that Congress intended to foreclose judicial review of the amount of benefits payable under Part B. Respondent points out, however, that 42 U.S.C. 1395ff(b) confers a right to judicial review on matters for which there is a right to a prior hearing by the Secretary; benefit determinations under Part B, in contrast, are made by private insurance carriers pursuant to a different section, 42 U.S.C. 1395u(b)(3)(C). Because administrative review of Part B benefit determinations is dealt with elsewhere, respondent argues that the failure of Congress to provide for a right to judicial review of such determinations in 42 U.S.C. 1395ff(b) is not significant. The difficulty with this argument is that Congress likewise did not afford a right to judicial review of Part B benefit amount determinations in 42 U.S.C. 1395u(b)(3)(C). The fact that Congress expressly provided for judicial review of Part A claims but did not so provide for Part B claims in *either* of the relevant sections plainly indicates a congressional intent to foreclose judicial review under Part B.

The significance of Congress' failure affirmatively to provide for judicial review under Part B when it did so under Part A is underscored by 42 U.S.C. 405(h). That Section, which is incorporated into the Medicare program through 42 U.S.C. 1395ii, states that no findings of fact or decision of the Secretary shall be reviewed by any "tribunal," except as provided in the Medicare Act itself. Because carriers act as agents of the Secretary in reviewing Part B

claims, this express preclusion of judicial review in Section 405(h) necessarily applies to Part B benefit determinations and is sufficient to foreclose Tucker Act jurisdiction in this case without resort to the legislative history. *Lehman* v. *Nakshian*, No. 80-242 (June 26, 1981), slip op. 9. Indeed, the third sentence of Section 405(h), which specifically addresses the jurisdiction of the district courts, expressly forecloses those courts from exercising their concurrent jurisdiction under the Tucker Act over Medicare claims. See U.S. Br. 42-43. Moreover, the legislative history, which respondent largely ignores, strongly reinforces the import of the statutory provisions just cited.

b. Respondent acknowledges (Resp. Br. 25-26) the passage in the Senate report on the 1965 Act which states that under Part B, "carriers, not the Secretary, would review beneficiary complaints regarding the amount of benefits" and that "the bill does not provide for judicial review of a determination concerning the amount of benefits under Part B where claims will probably be for substantially smaller amounts than under Part A" (S. Rep. No. 404, 89th Cong., 1st Sess. 54-55 (1965)). But respondent maintains (Resp. Br. 26) that this passage merely indicates that Congress was "deliberately silent" on the question of judicial review under Part B. Of course, congressional silence, if that were all that is involved here, would alone be sufficient to bar a suit for money damages against the United States. However, Congress was not "deliberately silent" on the question; it deliberately foreclosed judicial review of Part B benefit determinations.

Like the Court of Claims (Pet. App. 13a), respondent has quoted selectively from the passage in the 1965 Senate report, which is quoted in full in our opening brief (U.S. Br. 27-28). In the sentence immediately preceding that quoted by respondent, the report points out that administrative *and* judicial review are available under Part A--in contrast

to Part B, discussed in the sentence respondent quotes. In the last sentence of the passage, the report then states: "*It is intended that the remedies provided by these review procedures shall be exclusive.*" This sentence makes clear that the procedure for pursuing Part B claims—review by the carrier (rather than the Secretary), without the right to subsequent judicial review available under Part A—was intended to be "exclusive."

Respondent also fails to mention, much less answer, the discussion in our opening brief (U.S. Br. 28-30) of the 1972 amendments to 42 U.S.C. 1395ff. Prior to 1972, that Section had been interpreted to permit judicial review of an individual's "entitlement" to receive any payment for particular services under Part B, but not the amount of payment due. *Bohlen* v. *Richardson*, 345 F. Supp. 124 (E.D. Pa. 1972), aff'd, 483 F. 2d 918 (3d Cir. 1973). Congress closed this unintended loophole by amending 42 U.S.C. 1395ff to read as it now does, subsuming questions of entitlement in the question of the amount (if any) of benefits due in a particular case. See U.S. Br. 29 & n.27; 42 U.S.C. 1395ff(b)(1)(C). Congress emphasized in the Conference Report that these amendments were intended to make clear that "*there is no authorization * * * for judicial review on matters solely involving amounts of benefits under Part B*" (H.R. Conf. Rep. No. 92-1605, 92d Cong., 2d Sess. 61 (1972) (emphasis added)).

Respondent suggests (Resp. Br. 26), however, that the import of the legislative history is that judicial review is barred only of the carrier's calculation of the *amount* payable for particular services, not of all statutory questions that might have an effect on benefit determinations. But these are not two distinct categories of cases, as respondent suggests. Respondent's own challenge, for example, is to Prudential's computation of the amount payable on respondent's assigned claims. Indeed, unless a beneficiary or his

assignee sought greater reimbursement, he presumably would not bother to file suit at all. Moreover, respondent has pointed to nothing indicating a congressional intent to draw a distinction between challenges to the amount of reimbursement that are based on the statute and challenges that are based on some other ground. To the contrary, the 1972 amendments foreclosing judicial review on questions of statutory "entitlement" to receive at least same payment for particular services in a given case and subsuming such questions in the determination of the amount (if any) of payment due make abundantly clear that Congress did not intend that any such distinction should be drawn for purposes of judicial review. Finally, the vast majority of claimants no doubt would be capable of withstanding a motion to dismiss by drafting an artful pleading that contests the carrier's determination as being in violation of the statute or implementing HHS regulations. Respondent's suggested approach therefore would foster litigation over the threshold question whether the particular issue involved is exempt from or subject to judicial review, and, as a result, it would frustrate the evident congressional purpose to foreclose litigation.

3. Apparently recognizing the weakness of its argument that the Medicare Act itself creates a right to sue the United States for money damages, respondent now seeks to attain the same result indirectly by arguing (Resp. Br. 14-19) that the Medicare statute establishes certain contractual relationships that in turn may be enforced by respondent's suit for money damages.[2] This basis of jurisdiction was not asserted in respondent's petition or supplemental petition in the Court of Claims and was not considered by that court. It

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[2]The Tucker Act confers jurisdiction on the Court of Claims to render judgment upon any claim against the United States founded "upon any express or implied contract with the United States * * *." 28 U.S.C. 1491.

therefore need not be considered here. In any event, respondent's contract claim is wholly without merit.

Respondent first contends (Resp. Br. 14-17) that a Medicare Part B beneficiary has a contract with the United States for the payment of benefits and that, as assignee, respondent may sue for breach of that contract. Respondent concedes there is no express contract, but argues that one may be implied in fact. However, Congress enacted the Medicare program as Title XVIII of the Social Security Act, and this Court has made clear that benefits under the Social Security Act are not contractual in nature. *Weinberger* v. *Salfi*, 422 U.S. 749, 771-772 (1975); *Flemming* v. *Nestor*, 363 U.S. 603, 608-611 (1960); cf. *United States Railroad Retirement Board* v. *Fritz*, 449 U.S. 166, 174 (1980).

Moreover, a contract implied in fact is an agreement "founded upon a meeting of minds, which, although not embodied in an express contract, is inferred, as a fact, from the conduct of the parties showing, in the light of the surrounding circumstances, their tacit understanding." *Baltimore & O.R.R.* v. *United States*, 261 U.S. 592, 597 (1923). Respondent did not allege, much less prove, any unique facts surrounding the relationships between the Secretary and the numerous individual Part B beneficiaries from whom it has accepted assignments that would suggest a meeting of the minds and the existence of implied-in-fact contracts between them.[3] It relies instead (Resp. Br. 15) on the terms of the Medicare statute alone, contending that the United States has "offered" in that statute to provide a supplemental insurance program and beneficiaries have "accepted" that offer by voluntarily enrolling in the program. As an initial matter, respondent overlooks the fact

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[3]In contrast, such particularized facts were alleged in *Fox* v. *Harris*, 488 F. Supp. 488, 492 (D.D.C. 1980), the only Medicare case respondent cites in support of its contract argument. *Harris* is discussed in our reply brief at the petition stage (at 7 n.4).

that persons who are enrolled in the Part A Medicare program are automatically enrolled under Part B unless they withdraw from coverage. 42 U.S.C. 1395p(f) and 1395q(b). Thus, there is no occasion for a particularized meeting of the minds between the Secretary and the individual upon the latter's enrollment under Part B. In addition, respondent's argument presumably would lead to the finding of a contractual relationship between the Secretary and all 27 million beneficiaries under Part B, a truly startling result to reach by mere "implication."

In any event, the contract that respondent suggests is created by nothing more than the terms of the Medicare statute itself would not be an implied-in-fact contract, but would be one implied in law, or a quasi-contract—"an obligation that is created by the law without regard to expressions of assent by either words or acts." 1 A. Corbin *Contracts* § 19, at 44 (1963). It is well settled that the Tucker Act does not confer jurisdiction over claims arising under quasi-contracts or contracts implied in law. *Hatzlachh Supply Co.* v. *United States*, 444 U.S. 460, 465 n.5 (1980); *United States* v. *Algoma Lumber Co.*, 305 U.S. 415, 418 (1939); *Merritt* v. *United States*, 267 U.S. 338, 341 (1925).[4] Finally, even if the terms of the Medicare statute itself could be said to create contracts between the Secretary and each of the 27 million individual Medicare beneficiaries, one of the statutory terms included in those contracts necessarily would be the statutory preclusion, discussed above, of a right to sue the United States to recover on a claim denied by a Part B carrier.

For similar reasons, respondent errs in contending that, although the Medicare Act itself confers no right to sue the

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[4]See generally the government's brief in *Army and Air Force Exchange Service* v. *Sheehan*, No. 80-1437 (to be argued Feb. 23, 1982), at 22-25. We have furnished respondent with copies of the government's briefs in *Sheehan*.

United States, this deliberate omission can be circumvented simply by characterizing the 27 million Medicare beneficiaries and their assignees as third party beneficiaries who may sue to enforce the provision of the contracts between the Secretary and the carriers under which the carriers are obligated to determine and pay Part B benefits. The terms of the contract between the carrier and the Secretary upon which respondent relies (Resp. Br. 18-19) are in fact provisions of the statute, 42 U.S.C. 1395u, not any particular provisions of the actual contract between Prudential and the Secretary.[5] Thus, respondent's third party beneficiary argument is but another way of saying that the Medicare Act affirmatively grants the beneficiaries a right to sue the United States for money damages, an argument that must be rejected for the reasons given above.

4. Finally, respondent argues (Resp. Br. 28-33) that serious constitutional questions would be presented if the Medicare Act were construed to bar judicial review in all situations, even where constitutional questions are raised, and that the Act therefore should be construed to allow judicial review. This argument is entirely misplaced in the context of the present case.

This case concerns only the jurisdiction of the Court of Claims under the Tucker Act. It is well-settled that the Tucker Act does not confer jurisdiction over cases seeking money damages for alleged violations of the Due Process

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[5]Moreover, respondent has not sued Prudential, the party that allegedly has breached the contract; it has sued the United States. Of course, respondent could not sue Prudential in these circumstances either. See U.S. Br. 27 n.24. See also *Mitchell* v. *Occidental Insurance, Medicare*, 619 F. 2d 28, 30 (9th Cir. 1980); *Matranga* v. *Travelers Insurance Co.*, 563 F. 2d 677 (5th Cir. 1977); *Pine View Gardens, Inc.* v. *Mutual of Omaha Insurance Co.*, 485 F. 2d 1073, 1075 (D.C. Cir. 1973).

Clause,[6] the constitutional violations respondent alleged here, because that Clause does not mandate the payment of compensation for a violation. See *United States* v. *Testan, supra*, 424 U.S. at 400; *United States* v. *Hopkins*, 427 U.S. 123, 130 (1976); *Alabama Hospital Association* v. *United States*, 656 F. 2d 606, 609 (Ct. Cl. 1981), petition for cert. pending, No. 81-875. Moreover, even if the Court were to construe the Medicare Act to permit judicial review of certain constitutional issues in order to avoid the constitutional question that might be raised by a complete bar to such review, this would afford no basis for also construing the Act, as respondent urges, to authorize suits against the United States to the extent they raise purely statutory issues. Cf. *Califano* v. *Sanders*, 430 U.S. 99, 108-109 (1977).

For the foregoing reasons and the additional reasons stated in our opening brief, it is respectfully submitted that the judgment of the Court of Claims should be vacated and the case remanded with directions to dismiss for lack of jurisdiction.

REX E. LEE
Solicitor General

FEBRUARY 1982

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[6]Respondent also alleged a violation of the Just Compensation Clause (Resp. Br. 6-7 n.5), for which the Tucker Act does provide jurisdiction (see *United States* v. *Testan, supra*, 424 U.S. at 401), but the just compensation issue is not involved in this case. See U.S. Br. 11 n.13.